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BEFORE THE

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Federal Communications Commission

WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Carriage of Digital Television Broadcast Signals	)	CS Docket No. 98-120
	)	

TO: The Commission

JOINT COMMENTS OF INSIGHT COMMUNICATIONS COMPANY, L.P. AND MEDIACOM COMMUNICATIONS CORPORATION

Insight Communications Company, L.P. ("Insight") and Mediacom Communications Corporation ("Mediacom") (collectively "Joint Commentors"), through their attorneys, file these comments in the above-captioned proceeding to address issues raised by the Commission's Further Notice of Proposed Rulemaking ("FNPRM").[1] The Joint Commentors believe that dual must carry, in addition to being beyond the Commission's authority and constitutionally infirm, would be fundamentally unfair to, and adversely impact, the Joint Commentors and their customers.[2]

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List A B C D E

[1]*In the Matter of Carriage of Digital Television Broadcast Signals*, First Report and Order and Further Notice of Proposed Rulemaking in CS Docket No. 98-120, FCC 01-22, 16 FCC Rcd 2598 (rel. January 23, 2001) ("*Digital Must Carry Order and FNPRM*").

[2]The Joint Commentors have specifically refrained from addressing the issues of constitutionality in these Joint Comments in order to focus on the adverse effect dual must carry would have on the Joint Commentors and their customers.

I. INTRODUCTION

Insight and Mediacom are multiple system operators ("MSOs") whose efforts have largely focused on developing state-of-the-art systems that provide customers a complement of advanced services in addition to traditional multichannel video programming.

Insight is one of the ten largest cable operators, having grown from serving approximately 180,000 customers in 1997 to approximately 1.4 million customers today. Using state-of-the-art technology, Insight offers its customers a variety of advanced services, including interactive digital video, high-speed Internet access and telephone service marketed under the AT&T Digital brand. For example, Insight offers a video-on-demand service in selected markets that allows its customers significantly more viewing options, in addition to interactive digital services which allow Insight to offer customized information for its customers that is rich in local content and targeted to a specific system or community. Insight also plans to open an electronic mall with approximately 50 retail outlets.

Mediacom is also one of the ten largest MSOs in the United States. Mediacom started with 16,000 customers in 1996 and has grown over the last five years to its present size of approximately 777,000 customers. Upon completing its pending acquisition from AT&T Broadband of cable systems serving approximately 838,000 customers, Mediacom will more than double the number of customers it currently serves. Like Insight, Mediacom continues to upgrade and rebuild its systems, offers advanced services, including digital video programming and high-speed Internet access, and is positioning itself to offer telephony and interactive services.

II. DUAL MUST-CARRY WOULD UNFAIRLY APPROPRIATE SCARCE CABLE SYSTEM CAPACITY WITHOUT A CONCOMITANT BENEFIT TO VIEWERS.

A. Cable Capacity Is at a Premium.

Today's cable operators are multidimensional, striving to offer their customers a wide variety of advanced services. To this end, cable operators have embarked on extensive campaigns to rebuild or upgrade their systems. Since passage of the 1996 Telecommunications Act, the cable industry has spent approximately $42 billion dollars to upgrade its infrastructure.

Notwithstanding such efforts to upgrade cable system facilities, capacity remains at a premium. In addition to their full complement of analog video programming, many Insight and Mediacom systems also offer digital tiers and high-speed Internet access. In addition, Insight has deployed interactive digital video and is increasingly offering telephone service on many of its systems, and Mediacom is positioning itself to offer similar services as well. Each of these services places great demand on cable systems' finite capacity, and future technological advances that will bring additional services will demand more of increasingly scarce system capacity.

Unlike broadcasters, who have received their spectrum at no cost, cable operators have had to build their businesses solely relying on private sources of financing and public offerings of debt and equity, without grants or subsidies from the government. Upgrading systems to offer advanced services, however, is no small financial undertaking.

B. Dual Must Carry Remains Fundamentally Unfair to Cable Operators.

For more than half a century, broadcasters have used scarce spectrum for free to offer analog television. With the advent of digital television, broadcasters have an opportunity to offer a variety of services using a 6 MHz channel. Notwithstanding the premium placed on coveted spectrum,[3] Congress chose yet again to hand out spectrum to broadcasters for free. More amazingly, broadcasters may maintain both their analog and digital spectrum, at no cost to them, for a yet-to-be-determined amount of time.[4]

Cable operators have not enjoyed such handouts. They have had to establish and grow their businesses on their own, without the benefit of government subsidies. The cost of upgrading and rebuilding cable systems is significant, not to mention the costs associated with programming, system maintenance and operation, and compliance with regulatory burdens. That investment, however, is absolutely necessary if cable operators want to remain competitive with the variety of new technologies that offer similar services, *e.g.,* direct broadcast satellite service.

A dual must carry requirement would be fundamentally unfair to cable. In many cases, cable operators would have to drop existing programming or say no to new, more desirable and unique programming (analog or digital) in order to accommodate dual carriage. This interferes with cable operators' editorial discretion[5] and their ability to offer customers the programming

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[3]*See* 47 U.S.C. § 309(j) (discussing competitive bidding in general and outlining the objectives that the Commission should seek to promote through the use of competitive bidding); *see also* Licenses of 21st Century Telesis, Inc. for Facilities in the Broadband Personal Communications Services Petition for Reconsideration, FCC 00-434, 15 FCC Rcd 25113 (rel. December 8, 2000) at ¶ 22 ("Congress gave the Commission the authority to auction radio spectrum licenses in order to effect particular policies and goals, among which is to promote the rapid development of new technologies, products, and services to the American public while recovering for the public the value of that spectrum. Section 309(j) specifically includes a presumption that licenses should be assigned by auction to those who place the highest value on the use of the spectrum. Such entities are presumed to be those best able to put the licenses to their most efficient use.").

[4]*See* 47 U.S.C. § 309(j)(14).

[5]This interference with editorial discretion raises First Amendment issues that the Joint Commentors do not address herein but would be glad to explore should the Commission so

and other services that they want. In essence, the Commission would be "rewarding" cable's efforts and success by relegating cable systems to second-class status and appropriating the fruit of cable's labor to broadcasters.

Cable operators' rights have already been compromised as a result of Commission efforts to facilitate the digital transition and the return of analog spectrum. For example, the Commission has empowered digital-only television stations with the ability to demand analog carriage of their digital signals.[6] Any requirement to carry both analog and digital signals will simply compound the unfairness to cable operators, especially since the cable industry is not just talking about the digital transition but has already been doing something about it. Specifically:

- rebuilds are 75% complete;
- HBO, alone, is offering more high definition programming than all of the broadcast networks combined;
- they have negotiated a technical standards agreement with the consumer electronics industry; and
- they are developing a multitude of new digital channels.[7]

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request.

[6]*See In the Matter of WHDT-DT, Channel 59, Stuart, Florida*, Memorandum Opinion and Order in CSR-5562-Z, FCC 01-23, 16 FCC Rcd 2692 (rel. January 23, 2001) (empowering new digital-only television stations to demand analog carriage of their digital signals); *See Digital Must Carry Order and FNPRM* at ¶ 74 (finding that all digital-only television stations, new licensees and broadcasters that have returned their analog spectrum, may demand analog carriage of their digital signals).

[7]*See* Testimony of Michael S. Willner, President and CEO, Insight Communications, before the Senate Commerce Committee Hearing on the Transition to Digital Television (March 1, 2001).

Surely, the Commission cannot believe that further burdening cable operators with additional carriage obligations will propel the digital transition forward. Some broadcasters have not met their deadlines to commence digital operations for a variety of reasons, *e.g.,* zoning and tower issues.[8] Other digital television issues remain unresolved.[9] The digital transition simply will not move forward until the Commission resolves these issues.

C. Dual Must Carry Requirements Would Not Serve the Public Interest of Subscribers.

Dual must carry requirements would not serve the public interest of subscribers. Beginning in 2003, digital television stations must begin to simulcast at least 50% of the video programming from their analog channels on their digital channels, which amount increases to 75% in 2004, and beginning April 1, 2005, broadcasters must simulcast 100% of their analog

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[8]*See Digital Television Transition: Presentation to the FCC,* Roy Stewart, Chief, Mass Media Bureau (April 19, 2001), located at http://www.fcc.gov/dtv/ (last visited June 11, 2001) (noting build-out delays relating to the Top 30 markets and challenges that lie ahead for broadcasters in smaller markets); *see also In the Matter of Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television,* Report and Order and Further Notice of Proposed Rulemaking in MM Docket No. 00-39, FCC 01-24 (rel. January 19, 2001) at ¶ 7 (noting that some broadcasters have sought extensions of time to complete the buildout of the digital facilities due, at least in part, to tower issues.)

[9]*See, e.g., In the Matter of Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television,* Report and Order and Further Notice of Proposed Rulemaking in MM Docket No. 00-39, FCC 01-24 (rel. January 19, 2001) at ¶ 104 (requesting comment on several digital television issues, including whether the Commission should adopt DTV reception capability requirements that would require certain new television receivers to have the capability to receive DTV signals).

programming until such time as they relinquish their analog spectrum.[10] If the Commission decides to require dual carriage, cable subscribers would receive duplicate programming on two different channels, frequently at the expense of some other programming or service.[11] Unlike other things in life, two-for-one is not a bonus for consumers in the case of dual carriage -- consumers do not want duplicative versions of each and every broadcast station. It is ludicrous to think that displacing distinct programming, such as ethnic or educational niche programming, in favor of duplicate programming would somehow serve the public interest. Dual must carry is neither pro-consumer nor will it speed the digital transition because it does not encourage consumer migration to digital - consumers benefit if cable operators are free to use their digital capacity for the things consumers want. It is of even more concern to the extent the deadline for turning in the analog spectrum could well be extended. The Joint Commentors respectfully submit that the public interest is best served by allowing cable operators the freedom to provide consumers the new digital and advanced services they want today and in the future.

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[10]*See* Fifth Report and Order in MM Docket No. 87-268, 12 FCC Rcd 12809 (1997) at ¶¶ 54-56.

[11]While the Joint Commentors have upgraded many of their systems, they also continue to operate smaller systems with lesser channel capacity. For these smaller systems, the impact of a dual carriage requirement obviously is that much worse because it will require displacement of programming more often.

III. CONCLUSION

A dual carriage requirement represents nothing more than a misguided attempt by broadcasters to abdicate their responsibility for completing the digital transition. Even though the Commission would like to hasten completion of the digital transition and return of the analog spectrum, it would more readily accomplish this by focusing its efforts on expediting commencement of digital broadcast operations and working to resolve other digital television issues. Based on the foregoing, the Joint Commentors therefore encourage the Commission to reject a dual carriage requirement.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Kyle Baker, a secretary with the law firm of Fleischman and Walsh, L.L.P. hereby certify that on this 11th day of June 2001, I have caused the foregoing COMMENTS to be sent via hand delivery or first class mail to each of the following:

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